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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1683

EDWARD B. BENJAMIN,

versus

WESTERN BOAT BUILDING CORP.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

EDWARD B. BENJAMIN

versus

WESTERN BOAT BUILDING CORP.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OFFICIAL REPORT BELOW

The case below is reported as *Edward B. Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723 (5th Cir. 1973). The opinion of the Court of Appeals for the Fifth Circuit is contained in a separate appendix.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit entered its opinion on January 26, 1973, and a judgment was thereafter entered on March 23, 1973, in accordance with Rule 36 of the Federal Rules of Appellate Procedure. On March 15, 1973, the United States Court of Appeals for the Fifth Circuit entered an opinion order on the Petition For Rehearing and Petition For Rehearing En Banc denying same.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether under the Due Process clause of the United States Constitution a Washington yacht manufacturing corporation is "doing business" in Louisiana for jurisdictional purposes where after extensive interstate negotiations between the buyer, in Louisiana, and the builder, in Washington, it contracts to build and in fact builds a yacht valued at several hundred thousand dollars, to be shipped by it to Louisiana, homeported in Louisiana, owned by a Louisianan, and used and sailed in Louisiana.

STATEMENT OF THE CASE

This diversity action was brought by Edward Benjamin, a Louisiana citizen, against Western Boat Building Corporation (Western), whose principal place of business and place of incorporation was in the State of Washington. The action sought damages for alleged breach of contract and breach of warranty concerned in the construction of the vessel INDRA IV. Western Boat Building Corporation brought a motion to dismiss, excepting to the jurisdiction of the Court and contending that it did not have sufficient "minimal contacts" with Louisiana to satisfy the requirements of jurisdiction. The District Court determined that Western had sufficient contacts with the State of Louisiana, and noted that Western had extensive negotiations through communications emanating from, and received in, Louisiana and the cause of action arose out of a com-

mercial agreement with foreseeable economic repercussions in Louisiana. The Court of Appeals for the Fifth Circuit reversed and held that Western had not engaged in sufficient in-state activity to meet the constitutional due process test. From that decision and the refusal to grant a rehearing therein, applicant seeks a writ herein.

Mr. Edward Benjamin of New Orleans sought to have a new yacht built for himself to be homeported in New Orleans. Preliminary negotiations were carried on between Western in Washington and Mr. Benjamin in New Orleans and Greensboro, North Carolina. Numerous documentary exchanges occurred. A contract was executed dated September 20, 1958, and Mr. Benjamin, as one of the parties to the contract, was described as being of 1213 Whitney Building, New Orleans, Louisiana. A surety bond issued wherein Western Boat Building Corporation further bound itself as principal unto Mr. Benjamin of New Orleans. Following the execution of the contract, the parties engaged in much correspondence centering about adjustments of price and alterations of equipment. The correspondence and negotiations subsequent to the execution of the contract were received in New Orleans by Mr. Benjamin as well as in Greensboro, North Carolina, and emanated from Mr. Benjamin in New Orleans and in Greensboro. Among the items concerned in the negotiations was the movement of the vessel from the West Coast to New Orleans. Ultimately, Western Boat arranged for the shipment of the vessel to New Orleans and built a cradle for her shipment. Numerous invoices for the building of the vessel and payments for the vessel were received in and emanated from New Or-

leans. Change orders emanated from New Orleans and acknowledgments of those orders were received in New Orleans.

When the vessel was originally admeasured in Tacoma, Washington, the home port of the vessel was listed as New Orleans and her owner was described as a New Orleans resident. Numerous yachting publications described INDRA IV as having been built for Mr. Benjamin of New Orleans by the Washington firm of Western Boat Building Corporation. Western Boat itself advertised in boating magazines of general circulation. Prior to the building of INDRA IV, it even sent Christmas cards to Mr. Benjamin.

Following the discovery of defects in the vessel, Western advised with Mr. Benjamin in New Orleans and recommended to Mr. Benjamin certain firms for gauging work. In response to an invitation to examine the vessel, Western employed a Louisiana firm to examine the vessel at her homeport.

REASONS FOR GRANTING CERTIORARI

The opinion of the Court of Appeals for the Fifth Circuit is in direct conflict with the holding of this Court in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199 (1957), inasmuch as the Fifth Circuit requires some physical in-state business activity on the part of a party to confer *in personam* jurisdiction. This results in a repudiation of the stream of commerce theory of jurisdiction and creates a conflict among the Circuits.

ARGUMENT

I.

THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH OPINIONS OF THIS HONORABLE COURT, PARTICULARLY WITH McGEE V. INTERNATIONAL LIFE INSURANCE COMPANY

The Fifth Circuit's opinion in this matter represents a conflict with the Court's now famous opinion in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199 (1957), as well as other opinions of this Court and opinions of other Circuit Courts of Appeal as hereinafter demonstrated. The Court stated in *McGee* that "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223, 78 S.Ct. at 201. The facts there showed that an insurance contract was delivered in California, premiums were mailed from California, and the insured was a resident of California when he died. Accordingly, California had jurisdiction over a non-resident insurer having no other contact with the State. Here, a Washington corporation negotiated a contract with a Louisiana domiciliary to build a fine quality yacht to be shipped to, homeported in, and used in Louisiana. The funds for the contract, some $140,000.00, came from the Whitney Bank, New Orleans, Louisiana, with one exception, where a check emanated from a bank in Greensboro, North Carolina, Mr. Benjamin's summer home. Perhaps more important, as a result of breaches of contract and torts committed by Western Boat, substantial damage, well in excess of contract price, were sustained by a Louisiana

domiciliary, in Louisiana, when the hull manufactured by Western Boat literally rotted to pieces. It is respectfully submitted that the contract of Western Boat had substantial connection with Louisiana. The Fifth Circuit therein distinguished *McGee* because of the "sensitive nature of the insurance business." 472 F.2d 723, 730. The Supreme Court made no such distinction. Rather, the *McGee* case was premised on "the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. International Life Ins. Co.*, 355 U.S. at 223; 78 S.Ct. at 201. The Court did not limit the case in any way to the insurance industry as did the Fifth Circuit, but stated that "It is sufficient for purposes of due process that suit was based on a contract which had substantial connection with that State." *Id.*, at 223, 78 S.Ct. at 201. The cases cited by the Supreme Court in *McGee* involve matters other than insurance.

Under the rule of *McGee v. International Life Ins. Co.*, supra, there can be no question that the contract herein had substantial connection with the State of Louisiana and that a vessel worth well over $200,000.00 was constructed for specific use in Louisiana by a Louisiana domiciliary. There can be no question that the parties herein intended for the vessel to have its homeport in Louisiana.

II.

THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH OPINIONS OF OTHER CIRCUITS AND IN EFFECT REPUDIATES THE "STREAM OF COMMERCE" THEORY OF JURISDICTION OVER NON-RESIDENTS

A majority of the circuits and district courts now hold that where a foreign corporation introduces a product into the stream of interstate commerce, it is amenable to the jurisdiction of *any* state where it had reason to know or expect its product would be brought and where injury in fact occurs. See e.g., *Florio v. Powder Power Tool Corp.*, 248 F.2d 367 (3rd Cir. 1957); *Etzler v. Dille and McGuire Mfg. Co.*, 249 F.Supp. 1 (W.D.Va. 1965); *Keckler v. Brookwood Country Club* 248 F.Supp. 645, 648-649 (N.D.Ill. 1965); *Harford v. Smith*, 257 F.Supp. 578 (N.D.W.Va. 1966); *Jackson v. National Linen Service Corp.*, 248 F.Supp. 962 (W.D. Va. 1965); *Anderson v. Penncraft Tool Co.*, 200 F.Supp. 145 (N.D.Ill. 1961); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); Cf. *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969), (former Fifth Circuit precedent supporting the "stream of commerce" theory, now apparently abandoned by the Fifth Circuit).

The applicability of the "stream of commerce" theory to the instant cause is at once apparent: a first quality yacht was manufactured by a Washington corporation and shipped to Louisiana, homeported in Louisiana, to be used and sailed by a Louisiana domiciliary, in Louisiana waters. The parties at all times were

actually aware of usage in Louisiana and expressly intended same.

This Honorable Court has never passed directly on the "stream of commerce" theory of jurisdiction over non-resident manufacturers and the instant case affords the Court a vehicle for decision on the issue and as a vehicle for resolution of the conflict among the Circuits which has developed over the years. The issue decided by the Fifth Circuit and presented to this Honorable Court is strictly one of constitutional law and a decision by the Court herein would fairly settle the applicable law which, despite the Court's holdings in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154 and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, remains in a state of uncertainty.

CONCLUSION

From a qualitative and quantitative point of view, Western Boat Building Corporation had sufficient contacts with Mr. Benjamin to be amenable to suit in Louisiana. Considerable equitable harm was caused to the Louisianan who bought a product from a Washington manufacturer. The builder of the vessel knew that she was destined for Louisiana and would spend her days largely in Louisiana waters, at and about her home port and residence of her owner. The reasons and arguments set forth above, a writ of certiorari should issue herein.

Respectfully Submitted:

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon MR. LAWRENCE L. McNAMARA, One Shell Square, New Orleans, Louisiana 70112; upon MR. HENDRIK UITERWYK, 2141 International Trade Mart Building, New Orleans, Louisiana 70130; upon MR. GERARD H. SCHREIBER, 8137 Oleander Street, New Orleans, Louisiana 70118; and upon MR. ALAN Y. COLE, 1730 "K" Street, N.W., Washington, D.C. by depositing same in the United States Mails, postage prepaid, this 13 day of JUNE, 1973.

WILLIAM A. PORTEOUS, III

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1058

EDWARD B. BENJAMIN,
Plaintiff-Appellee,
versus

WESTERN BOAT BUILDING CORPORATION,
Defendant-Third Party
Plaintiff-Appellant,
versus

ROGER McALEER,
Third Party
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

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(January 26, 1973)

Before RIVES, AINSWORTH and RONEY,
Circuit Judges.

RONEY, Circuit Judge: In this Louisiana diversity case, we are asked to determine whether the District Court was correct in asserting *in personam* jurisdiction over the defendant, and in denying *in personam* jurisdiction over the third-party defendant, under the state "long-arm" statute. Because we hold that the in-state activity of neither defendant was sufficient to satisfy the "minimum contacts" requirement of constitutional due process, we reverse the assertion of *in personam* jurisdiction over the defendant and affirm the dismissal of the third party complaint.

Edward B. Benjamin, a resident of Louisiana, sued Western Boat Building Corporation, a Washington corporation, for an alleged breach of contract in the construction of Benjamin's 53 foot auxiliary yawl INDRA IV. After the District Court denied Western Boat's motion to dismiss for lack of *in personam* jurisdiction, Western Boat filed a third party complaint against the vessel's designer Robert W. McAleer, a naval architect in Alexandria, Virginia. The District Court dismissed the third party complaint for lack of *in personam* jurisdiction over McAleer. Western Boat appeals both rulings. It took an appeal as of right from the final judgment dismissing McAleer, and the District Court certified for interlocutory appeal the question of its jurisdiction over Western Boat. 28 U.S.C.A. § 1292(b).

Although the Louisiana "long-arm" statute, LSA-R.S. 13:3201, is pertinent because Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure permit service of process in accordance with the law of the state in which the District Court sits, we do not decide

this case under the Louisiana law. Instead, we posit this decision on the failure of the exercise of *in personam* jurisdiction to meet the due process standard required by the United States Constitution. Our decision would appear to violate the usually sound practice of refusing to reach constitutional questions if a case can be decided on nonconstitutional grounds. *See, e.g., Burton v. United States,* 196 U.S. 283 (1905); *Texas v. Grundstrom,* 404 F.2d 644 (5th Cir. 1968). But we find our approach to be the better part of discretion here because it is unclear whether the Louisiana statute was intended to go to the permissible limits of due process in the exercise of *in personam* jurisdiction in contract cases, and we think that good federalism requires us to refrain from making law for Louisiana in this regard.[1] Moreover, the case can be disposed of readily on the constitutional ground, on the authority of existing decisions, without creating any new constitutional law.

---

[1]No Louisiana case has explicitly articulated a distinction between contract and tort cases under the "long-arm" statute, but one Louisiana commentator has argued that the practice of Louisiana courts indicates a narrower scope for the statute in contract cases, a scope that does not extend to the outer limits permitted by the Constitution. *See* Lewis, *Suing a Nonresident — The Reach of Louisiana's Long-Arm Statute,* 19 La. B.J. 205 (1971). Recent Louisiana decisions may support such a view. *See, e.g. Riverland Hardwood Co. v. Craftsman Hardwood Lumber Co.,* 251 So.2d 45 (La. 1971); *Bowlero, Inc. v. Allen,* 205 So.2d 196 (La. App. 1967); *Moore v. Evans,* 196 So.2d 839 (La. App. 1967), *writ refused,* 199 So.2d 914 (La. 1967); *Fidelity Credit Co. v. Bradford,* 177 So.2d 635 (La. App. 1965), *writ refused,* 179 So.2d 273 (La. 1965). We do not consider the question.

CONSTITUTIONAL STANDARD

There is no objective test by which to judge the facts of a particular case to determine if the assertion of *in personam* jurisdiction exceeds the limits of constitutional due process. Although the jurisdictional theory of *Pennoyer v. Neff*, 95 U.S. 714 (1878), required some personal presence within the territorial jurisdiction of a court to support a personal judgment, that theory was drastically changed by *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). *International Shoe* held that due process requires only that the defendant have sufficient contacts with the forum state to permit the suit to be maintained without offending traditional notions of fair play and substantial justice. Later Supreme Court cases have failed to develop any precise standard as to what those "minimum contacts" must be. *See Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

Analysis of our own cases reveals that, while very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement, we have, nevertheless, unequivocally required *some* activity by the defendant before permitting the exercise of *in personam* jurisdiction under a state "long-arm" statute, the jurisdictional touchstone being the presence of sufficient in-state business activity to indicate a purposeful enjoyment of the benefits and protections of that state's law. For example, in *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir. 1969), this Court decided that due process requirements did not prevent

a Federal District Court in Texas from exercising *in personam* jurisdiction, under the Texas "long-arm" statute, over the nonresident manufacturer of an allegedly defective amusement ride, called a Rock-O-Plane, the operation of which had caused a personal injury in Texas. The manufacturer, an Oregon corporation, had sold the ride to an itinerant amusement company almost twenty years before the Texas accident. The *Eyerly Aircraft* decision sustained *in personam* jurisdiction on two grounds: First, the defendant manufacturer Eyerly Aircraft had introduced the Rock-O-Plane into the stream of interstate commerce with reason to know or to expect that the ride would eventually be brought to Texas. Second, Eyerly Aircraft had direct contacts with Texas in the form of substantial and continuing business relations with Texas firms. Among these contacts were (1) sales and deliveries of amusement devices and parts directly into the state; (2) the extension of credit in the state; (3) the retention of liens on items sold; (4) the filing of such liens with state and county authorities; (5) the servicing of machines in the state; and (6) the solicitation of business in the state. The *Eyerly Aircraft* Court characterized these contacts as "neither occasional nor sporadic," but rather as "continuous and substantial." 414 F.2d at 594-95.

Subsequent to *Eyerly Aircraft*, this Court approved "long-arm" jurisdiction resting upon a "stream of commerce" theory. In *Coulter v. Sears, Roebuck & Co.*, 426 F.2d 1315 (5th Cir. 1970), the Texas plaintiffs had purchased a television set from Sears in Lubbock, Texas. After it allegedly burst into flames and partial-

ly destroyed their home, they sued Sears in Texas. Sears filed a third party complaint against the manufacturer of the television, Warwick Electronics, Inc., a Delaware corporation having its principal place of business in Chicago, Illinois. The District Court granted Warwick's motion to dismiss the third party complaint for want of *in personam* jurisdiction but this Court reversed. We held that the minimum contacts requirement was satisfied by Warwick's "direct and substantial" contacts with Texas through its television sets. Although Warwick was not authorized to do business in Texas and did not maintain a regular place of business in that state, its contact with the Lone Star State was the presence within the state of a substanial number of its television sets. The plaintiffs' television had followed a marketing route defined by a pattern of distribution established over a long period of time. Warwick had sold its television sets knowing that Sears resold a substantial number of them in Texas, so Warwick had purposefully enjoyed the benefits of the Texas market and the protections of that state's laws.

Thus, in both *Eyerly* and *Coulter*, substantial activity within the forum state satisfied the minimum contacts requirement of constitutional due process.

Where the requisite contacts are not present, however, this Court has unhesitatingly prohibited the exercise of *in personam* jurisdiction. For example, in *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964), a Louisiana plaintiff sued the New York Times and several other major newspapers for libel. The District Courts dismissed the suits for lack of *in personam*

jurisdiction, and this Court affirmed. We there held that, singly or in combination, the mere circulation of a periodical through the mails to subscribers and independent distributors, sporadic news gathering by reporters on special assignment, and the solicitation of a small amount of advertising constitute neither doing business nor engaging in a business activity. The Court further stated in *Buckley* that such a "casual presence" in the forum state was "not enough to make it reasonable and just, and in conformity with the due process requirements of the Fourteenth Amendment, for the State of Louisiana to enforce against them obligations arising out of such activities." 338 F.2d at 475.

In *Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334 (5th Cir. 1971), a Florida corporation sued a Mexican resident on a contract for the sale of a vessel that had run aground off the coast of Mexico. Defendant Peterson had telegraphed an offer from Mexico to the vessel's Florida owners, and the offer had been accepted by return telegram sent from Florida. When Peterson later refused to complete the sale, the owners sued him in Florida for specific performance. The District Court denied Peterson's motion to dismiss for lack of *in personam* jurisdiction, but this Court reversed. Acknowledging that the Florida "long-arm" statute should be construed as broadly as is consistent with due process, the Court nevertheless held that Peterson had not had the requisite minimum contacts with Florida and that maintenance of the action would offend traditional notions of fair play and substantial justice. *See also Florida Towing Corp. v. Oliver J. Olson & Co.*, 426 F.2d 896 (5th Cir. 1970).

The most recent case in this Circuit to consider the minimum contacts requirement, *Owen of Georgia, Inc. v. Blitman*, 462 F.2d 603 (5th Cir. 1972), reaffirmed our reluctance to uphold *in personam* jurisdiction where the nonresident defendant has not purposefully enjoyed the benefits and protections of the forum state's law. *Blitman* was a suit by a Georgia plaintiff against Massachusetts defendants for alleged breach of an oral contract. The plaintiff, a Georgia steel fabricator, had been contacted by another Massachusetts corporation, Design Structures, Inc., and informed that the defendants' Boston construction project required certain fabricated materials. A representative of the plaintiff then traveled to Massachusetts, met with representatives of the defendants, and allegedly entered into an oral agreement for the necessary steel fabrication to be performed in the plaintiff's Georgia factory. This Court held that the defendants had simply not had sufficient contacts with the State of Georgia to satisfy constitutional due process standards. We did not reach the question of whether the contacts would have been sufficient had Design Structures, Inc., acted as the defendants' agent in soliciting the plaintiff, because the plaintiff had failed to establish the agency relationship.

Against the background of these cases, we have examined the facts in the case before us and have concluded that there is such an absence of contact by Western Boat with the territorial jurisdiction of Louisiana that the maintenance of a suit against it in Louisiana for a personal judgment offends "traditional notions of fair play and substantial justice."

FACTS

In early 1957, Benjamin contacted McAleer and arranged to meet with him in Washington, D. C. Meeting as planned on March 5, 1957, they orally agreed that McAleer would design a new sailboat for Benjamin, produce construction specifications, take bids for the vessel's construction, make recommendations to Benjamin on those bids, and make several inspection trips to the boat builder's yard during construction.

After a year of design, McAleer requested a bid from Western Boat on August 28, 1958. Western Boat submitted a bid to McAleer in Alexandria, Virginia, on September 10, 1958, and sent a copy of the bid to Benjamin at his part-time home in Greensboro, North Carolina. In reply, Western Boat received a letter from Benjamin dated September 22, 1958, written on stationery letterheaded "Edward B. Benjamin, Greensboro, N. C." This letter stated that Benjamin was forwarding four signed copies of the contract, and it requested return of the executed copies to him in Greensboro. On September 30, 1958, Western Boat accepted and executed the contract in Tacoma, Washington, when its officer signed and dated the contract. The same day, Western Boat mailed copies of the executed contract to Benjamin at Greensboro. On October 3, 1958, Benjamin sent a letter from Greensboro to Western Boat in Tacoma, acknowledging Western Boat's September 30 letter and receipt of the executed copies of the contract.

The contract itself called for construction of the vessel at Tacoma, Washington, in accordance with the plans and specifications to be furnished by McAleer. Benjamin was to furnish certain material for installation in the vessel at Tacoma, and inspections by Benjamin and by McAleer were to take place at Tacoma. Western Boat was to be paid in Tacoma, and Benjamin was to accept and to take delivery of the vessel at Tacoma.

After the contract had been executed, work on the vessel began immediately at Western Boat's yard at Tacoma. During construction, Benjamin, McAleer, and Western Boat communicated frequently, both by telephone and through written correspondence, about particulars of construction. Benjamin initiated nearly all of the correspondence, asking questions about the vessel's construction progress, inquiring about when his payments were due, telling of his planned usage of the vessel, and sometimes just giving his present location. One series of letters negotiated additional costs. Much of the correspondence originated from New Orleans, although a substantial volume was directed to Tacoma from such varied locations as Greensboro, North Carolina, Coconut Grove, Florida, and aboard ship.

In June, 1959, Western Boat invoiced Benjamin in Greensboro. Benjamin paid for the vessel with eight checks totalling $162,373.33, all but one of which were paid through a New Orleans bank. The single exception was a check for $35,000 drawn on a North Carolina bank.

In August, 1959, Benjamin traveled to Tacoma, where he accepted delivery and took physical possession of the vessel. He sailed it on the West Coast and shipped it from San Francisco to Tampa, Florida. The vessel was homeported in New Orleans where it immediately became a subject of widespread publicity in several yachting magazines enjoying national circulation.

Benjamin sailed his yacht for nearly ten years, apparently without complaint. In early January, 1969, Benjamin's maintenance crew discovered that the vessel's hull had corroded extensively. Benjamin contacted Western Boat, and a Western Boat employee suggested that he employ a particular Seattle firm to gauge the vessel's plating. Benjamin followed Western Boat's recommendation, and the Seattle firm performed the gauging in Louisiana. On June 3, 1969, Benjamin wrote to Western Boat complaining of alleged irregularities in the vessel's construction and inviting Western Boat to examine it in Louisiana. In response, Western Boat arranged for an independent Louisiana firm to inspect the INDRA IV. Benjamin filed suit against Western Boat on June 30, 1969, in both Louisiana and Washington. The District Court for the Western District of Washington dismissed Benjamin's suit as barred by the Washington statute of limitations.

DECISION

In the case at bar, the District Court entered no specific written findings and reasoning when it denied Western Boat's motion to dismiss for lack of *in person-*

am jurisdiction, but, in its memorandum opinion dismissing Western Boat's third party complaint against McAleer, the District Court did discuss briefly the reasons why it upheld jurisdiction over Western Boat. The District Court thought that Western Boat's advertising in media circulated in Louisiana, its warranty on repairs that foreseeably would be made in Louisiana, the repairs actually made in Louisiana and charged to Western Boat, the extensive communications and negotiations between Benjamin and Western Boat which emanated from and were received in Louisiana, and the commercial agreement with foreseeable economic effects in Louisiana together constituted sufficient "contacts" to sustain *in personam* jurisdiction.

On appeal, Benjamin has recast his argument to point up six sets of Western Boat "contacts" which, he argues, together satisfy the constitutional due process minimum contacts requirement: (1) preliminary negotiations, (2) the contract itself, (3) contacts subsequent to the execution of the contract, (4) place of enrollment (the home port) of the vessel, (5) publicity concerning the vessel and its manufacturer Western Boat, and (6) Western Boat's activities subsequent to Benjamin's notice that the vessel had manifested defects in construction. According to Benjamin, the totality of these contacts permits a Louisiana court to exercise *in personam* jurisdiction consistent with due process requirements. We disagree. Not even under the broadest interpretation of the due process minimum contacts requirement can Western Boat be found to have purposefully enjoyed the benefits and protections of Louisiana law.

Before examining Benjamin's six sets of "contacts," it is necessary to understand that these factors constitute the entire sum of Western Boat's contacts with Louisiana. Western Boat (1) is a corporation organized under the laws of Washington, (2) is not qualified to do business in Louisiana, (3) has neither incurred nor paid taxes to Louisiana, (4) has not appointed an agent for service of process in Louisiana, (5) has no office, no place of business, no officers, no agents, no employees, no salesmen, no licensees, no franchises, and no distributors in Louisiana, (6) has no independent dealers in Louisiana, (7) has no assets in Louisiana, (8) has never advertised in local Louisiana media and is not listed in any Louisiana telephone directories, (9) has never delivered, or arranged to be delivered, a vessel of any kind in Louisiana, (10) has never made a sale to a resident of Louisiana, other than the sale to Benjamin, and (11) has never sent representatives, inspectors, or repair or service personnel to Louisiana. Therefore, Western Boat's Louisiana contacts are limited solely to those contacts generated in the course of the transaction with Benjamin.

The preliminary negotiations consisted of McAleer soliciting bids, on Benjamin's behalf, for the construction of the vessel. Western Boat sent its bid to Benjamin in North Carolina. Benjamin allegedly signed the contract in New Orleans and sent it to Western Boat in Tacoma. Several intervening letters from both parties accompanied the transaction. Without more, this series of letters and exchange of the contract cannot be characterized as purposeful activity invoking the benefits and protections of Louisiana's laws.

The contract was formed on September 30, 1958, when Western Boat accepted and executed in Tacoma the written agreement allegedly signed by Benjamin in New Orleans. The contract reemphasized the Washington locus of the transaction by calling for construction, inspection, and delivery of the vessel at Tacoma. The contract mentions Louisiana only with respect to Benjamin, describing him as a resident of New Orleans. Benjamin contends that the contract should be viewed as providing a basis for *in personam* jurisdiction through the substantial revenue it produced from Louisiana for Western Boat. According to Benjamin's theory, the Supreme Court acknowledged in *McGee, supra,* that a single mail transaction could form the basis for *in personam* jurisdiction over a nonresident corporation, so therefore that reasoning should apply in this case to support jurisdiction. We disagree. *McGee* involved a transaction with a nonresident insurance company, and the sensitive nature of the insurance business lent additional weight to the Court's measure of the insurance company's contacts with the forum state. Moreover, *McGee* involved a fact situation substantially unlike the one in the case at bar, in that Benjamin initiated this transaction and consummated it when he accepted delivery of the vessel in Washington.

A major portion of Benjamin's argument focuses upon the communications between Benjamin and Western Boat during the period of time between the formation of the contract and the delivery date. Benjamin contends that these post-contract communications, some of which negotiated price and equipment adjust-

ments, created business contacts for Western Boat in Louisiana. According to Benjamin, nearly 50 letters either originated from or were received in Louisiana from 1957 until 1969, with the bulk of them coming after the date on which the contract was made. We find this contention singularly unpersuasive. The great majority of the letters was written by Benjamin to Western Boat, and the Supreme Court stated very clearly in *Hanson* that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 357 U.S. at 253.

As to the place of enrollment (the home port) of the vessel, Benjamin contends that Western Boat's knowledge that the vessel was to have its home port in Louisiana indicates that Western Boat was purposefully invoking the benefits and protections of Louisiana's law. This argument has three prongs:

First, Benjamin points out that Western Boat would have to file in New Orleans any liens that it had against the vessel, since New Orleans was its home port. Apart from whether Western Boat would have been invoking the protections of Louisiana law or of federal maritime law by filing a lien, the short answer to Benjamin's argument is that the contract required delivery of the vessel "free of liens of any kind" and Western Boat in fact never filed any such liens in New Orleans or anywhere else.

Second, Benjamin asserts that this Court's decision in *Coulter v. Sears, Roebuck and Co., supra*, permits

a finding of *in personam* jurisdiction where the nonresident seller knew that his product was to be brought into the forum state. This reading of *Coulter* is too broad. To be sure, *Coulter* adopted a "stream of commerce" theory, but that decision also emphasized that the defendant nonresident manufacturer had supplied its product to the forum state in large quantities over a lengthy period of time. In contrast, the transaction between Western Boat and Benjamin was merely an isolated sale that took place in the State of Washington.

Third, Benjamin and the District Court rely heavily upon the contractual guarantees against defects in the vessel. The contract made Western Boat liable for defects that appeared during the six month period immediately following acceptance and delivery of the vessel. The District Court and Benjamin reason that, since Western Boat knew that the vessel was to have its home port in Louisiana, it knew that any repairs under the warranty would necessarily be made in Louisiana. Again, the short answer is that no such repairs were ever made in Louisiana by Western Boat.

Benjamin next asserts that Western Boat's advertising activity provides a small but weighty Louisiana "contact." He points to three separate kinds of advertising to illustrate how Western Boat was actively advertising to attract Louisiana customers. First, Benjamin produced a Christmas card sent to him by Western Boat in the early 1950's. Second, he produced several advertisements for Western Boat's Fair Liner Division that had been reprinted from boating and yachting magazines and distributed to potential customers.

Assuming, for the purpose of argument, that Benjamin received these advertisements *in Louisiana*, a fact that was not established, we nevertheless think that they are of little jurisdictional moment. Benjamin's third example of Western Boat's Louisiana advertising likewise has little jurisdictional effect. Both before and after the construction of the vessel, Western Boat advertised regularly in national boating and yachting magazines that were circulated in Louisiana. And after Benjamin's yacht had been completed, several feature stories in these magazines described the vessel as having its home port in New Orleans and identified Western Boat as its manufacturer. This Court stated in *Buckley v. New York Times Co., supra*, that "[t]he law is well settled that the mere circulation of a periodical through the mails to subscribers and independent distributors constitutes neither doing business nor engaging in a business activity." 338 F.2d at 474. Similarly, absent other sales activities in the forum state, merely advertising in magazines of national circulation that are read in the forum state is not a significant contact for jurisdictional purposes. We intimate no opinion on the situation where, unlike the present case, the nonresident seller or manufacturer conducts an advertising campaign aimed at the citizens of the forum state by advertising in local media.

Lastly, Benjamin contends that Western Boat, by arranging for a Louisiana firm to inspect the vessel in 1969, purposefully invoked the protections of Louisiana's law. Again, in the context of this case, we cannot agree. The firm employed was not acting for Western Boat in an agency or employee capacity. Rather, it

functioned as an independent contractor. At no time did Western Boat send representatives, inspectors, a repair or service personnel to Louisiana.

In sum, applying the rule as developed in *Hanson v. Denckla, supra,* we must conclude that Western Boat's activity, if any, in Louisiana never achieved the sufficiency necessary to satisfy the "minimum contacts" requirement of constitutional due process. The party seeking to invoke the jurisdiction of a court has the burden of establishing jurisdiction, *see McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Tetco Metal Products, Inc. v. Langham*, 387 F.2d 721 (5th Cir. 1968); *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252 (5th Cir. 1961), and Benjamin has failed to meet that burden. The telephone and letter communications, the contract itself, Western Boat's knowledge that the vessel would be enrolled in New Orleans, the so-called advertising, and Western Boat's use of a local Louisiana firm to inspect the vessel: neither singly nor in combination do they indicate that Western Boat ever purposefully availed itself of the benefits and productions of the law of Louisiana. Maintenance of this action against Western Boat in Louisiana would unquestionably "offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. State of Washington, supra.*

II. McAleer

The District Court correctly dismissed, for lack of *in personam* jurisdiction, Western Boat's third party suit against McAleer. McAleer's contacts with Louisi-

ana were even less than Western Boat's, and they similarly fall far short of the level required by constitutional due process.

AFFIRMED IN PART and
REVERSED IN PART.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1058

EDWARD B. BENJAMIN,
Plaintiff-Appellee,

versus

WESTERN BOAT BUILDING CORPORATION,
Defendant-Third Party
Plaintiff-Appellant,

versus

ROGER McALEER,
Third Party
Defendant-Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 26, 1973, 5 Cir., 1973, ____ F.2d ____).

(March 15, 1973)

Before RIVES, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, HONORABLE EDWARD J. BOYLE, SR. PRESIDING, DATED NOV. 22, 1971

(Number and Title Omitted)

Filed: November 22, 1971

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BOYLE, District Judge:

This diversity action was brought by Edward Benjamin, a Louisiana citizen, against Western Boat Building Corporation (Western), whose principal place of business and place of incorporation is in the State of Washington, to recover damages for the alleged breach of contract and contractual warranties concerning the construction of the vessel INDRA IV. Western brought a motion to dismiss excepting to the jurisdiction of this Court and contending that it did not have sufficient dealings within the State of Louisiana which would satisfy the "minimal contacts" requirement for *in personam* jurisdiction. This Court determined that Western had sufficient contacts with the State of Louisiana and, therefore, denied the motion.

Western then filed a third-party complaint against Roger McAleer, a citizen of Virginia and the designer of the INDRA IV, seeking indemnity on the grounds that any defect in the INDRA IV resulted from inadequacies in McAleer's design and not through the faulty

workmanship of Western.[1] It is the third-party defendant, McAleer, who now seeks to be dismissed from this lawsuit on the grounds of lack of jurisdiction over the person and the resulting insufficiency of process. Western opposes on the grounds that McAleer, through his various communications with Benjamin, has had sufficient contacts with the State of Louisiana to subject him to the personal jurisdiction of this Court.

The matters which give rise to this litigation began in 1957 when Benjamin contacted McAleer at his home in Virginia requesting McAleer to design the INDRA IV. Benjamin and McAleer had two subsequent meetings, one in Washington, D.C. and the other in Virginia, through which they reached a general agreement as to the kind of vessel to be designed and the fee which McAleer was to receive for the design of the vessel. The site of their next meeting was Boothbay Harbor, Maine, where they viewed the INDRA III and further discussed the details of the design of the INDRA IV.

After completing plans and specifications for the INDRA IV, McAleer solicited various shipbuilders (none of which was located in Louisiana) for bids on the construction of the vessel. In 1958 Benjamin selected Western's bid and construction of the INDRA IV was accomplished at Western's yard in Tacoma, Washington, in 1959.

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[1]Here we note that Western, through its answer, has raised the defense that if any defects in the vessel should be proved, such defects are the result of "[i]nadequate and/or faulty contract plans and specifications prepared by plaintiff and/or by plaintiff's architect."

The affidavit of McAleer, filed in connection with his motion, states that he is a naval architect and marine engineer licensed in both the District of Columbia and the Commonwealth of Virginia. From 1951 through 1956 McAleer served as a civilian employee of the Navy Department, but since that time has been self-employed as an engineering consultant and sales representative for various firms having business with the Government. On occasion he has been called upon to design yachts and other pleasure crafts for private individuals. Upon entering private business McAleer maintained an office at his home in Alexandria, Virginia, but has since had an office in Washington, D.C. (1960-1965) and in Arlington, Virginia (1965-present).

McAleer's affidavit also discloses that his initial discussions with Benjamin were carried on outside of Louisiana and that all work performed by him on the plans and specifications of the design of the INDRA IV was performed in Virginia. The solicitation of bids from shipbuilders for the construction of the vessel was conducted from McAleer's office in Virginia; no Louisiana shipbuilders were solicited for bids. All of McAleer's dealings with Western were likewise conducted from his Virginia office, except for the two occasions on which he visited with Western at its yard in Tacoma, Washington.

The affidavit further reflects that McAleer was not physically present in Louisiana during his work in connection with the bid solicitation or the design of the INDRA IV. McAleer has only twice visited the State of Louisiana — once in 1954 in connection with his em-

ployment by the Navy Department and once in 1969 to inspect the hull of the INDRA IV at the request of Benjamin.

The deposition of McAleer shows that his work on the bids and the design of the vessel was done between 1957 and 1959 and that during that time there were numerous communications (in the words of McAleer "a lot") between McAleer and Benjamin. Plans and specifications and revisions thereof were sent by McAleer to Benjamin in Louisiana and in North Carolina (McAleer Deposition p. 13). McAleer received and sometimes returned many phone calls and letters concerning his work for Benjamin while the latter was in Louisiana (McAleer Deposition, pp. 19-21). The deposition further reflects that communications between Benjamin and McAleer often originated from places other than Louisiana such as North Carolina, Maine, Washington and England. However, McAleer could not approximate what percent of the communication was received from or sent to Louisiana (McAleer Deposition pp. 105-110).

Western contends that jurisdiction over the person of McAleer is provided by the Louisiana "long arm" statute, La. R.S. 13:3201, which sets out the activities of a non-resident which would subject him to the jurisdiction of this Court on a cause of action arising out of such activity. (La. R.S. 13:3202). We find it unnecessary to consider the activities listed in subdivisions (c), (d) and (e) of R.S. 13:3201 since the alleged cause of action against McAleer arises neither in tort nor out of McAleer's interest in Louisiana immovable prop-

erty. Since Western does not contend that McAleer contracted to supply services or things in Louisiana, the activity listed in subdivision (b) of the statute, we need only determine whether McAleer's activity amounted to "(a) transacting any business in this State."

The official comment of the Louisiana Law Institute which immediately follows the statute states:

> "(d) 'Transacting business', as used in Subdivision (a) is a term which is much broader than 'doing business' as defined by earlier Louisiana cases, ... It is intended to mean a single transaction of either interstate or intrastate business, and to be as broad as the phrase 'engaged in a business activity' of R.S. 13:3471(1)."

La. R.S. 13:3471 which provides the method of service on a foreign corporation allows Louisiana Courts to "exercise the full potential of jurisdiction in personam over foreign corporations allowed by recent decisions of the United States Supreme Court, and particularly by *International Shoe Co. v. State of Washington,* 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057, and *McGee v. International Life Insurance Co.*, 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223."[2] La. R.S. 13:3201, enacted in 1964, is not limited to foreign corporations but applies to any nonresident.

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[2]See Comments by Henry G. McMahon, West's LSA-RS 13:3471, at p. 98 (1968).

The only contact with Louisiana which Western has been able to show on the part of McAleer, aside from his visit in 1959, is that some of his communications with Benjamin concerning the design of the vessel were received in or sent from the State. The question, therefore, is whether such communication is the equivalent to the transacting of business in Louisiana. We hold it is not.

In a diversity case such as this, Louisiana law will determine whether McAleer is subject to suit in Louisiana and the federal decisions on the subject are significant only in ascertaining whether the state law is within constitutional bounds.[3] In *Aucoin v. Hanson*, 207 So.2d 834 (La. App. 3rd Cir. 1968) the Court considered the question of whether R.S. 13:3201(a) was applicable to the activities of a Mississippi individual. The Court found that the Mississippi horse breeder was transacting business in Louisiana relating to the sale of horses on the bases of the following facts: the defendant had no horse or other property in Louisiana; he had been a member of the Louisiana Thoroughbred Breeders Association; he had purchased horses from Louisiana on prior occasions; he had raced his horses at the Fair Grounds in New Orleans and at Evangeline Downs in Lafayette; a Louisiana resident was acting in behalf of or as an agent of the defendant for the particular transaction at issue. It was also noted by the Court in *Aucoin* that it was unnecessary for the particular transaction at issue to be a direct and immediate result of defendant's business transactions in Louisiana, so

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[3]Wright, Law of Federal Courts 269 (2nd ed. 1970).

long as his prior business activities are related to and are of the same general nature as the one out of which the plaintiff's claim arose. 207 So.2d at 838.

In *Bowlero, Inc. v. Allen,* 205 So.2d 196 (La. App. 2nd Cir. 1967) the Court was faced with the question of whether the defendant's act of mailing a registered letter of demand into Louisiana constituted transacting business according to La. R.S. 13:3201. The Court determined that this was not transacting business and further held that the cause of action — a declaratory judgment as to the legal responsibility under certificates of indebtedness held by plaintiff — did not arise out of the mailing or receipt of the demand letter as required by La. R.S. 13:3202.

Fidelity Credit Company v. Bradford, 177 So.2d 635 (La. App. 3rd Cir. 1965) involved an exception to the jurisdiction rationae personae filed by the third-party defendant, Vacu-Maid, Inc. Vacu-Maid was neither qualified nor authorized to do business in Louisiana; it employed no personnel or salesmen, maintained no office in Louisiana and had not sent its representatives into the State. Vacu-Maid merely shipped its units into Louisiana on the orders of one Ebright who simply resold the units. Vacu-Maid exercised no controls over the subsequent sales of its units in Louisiana. According to the facts, the Court agreed that it was proper to sustain the exception to the jurisdiction.

The Louisiana Court of Appeal for the First Circuit has recognized that the liberal interpretation to be afforded the phrase "a business activity," as contained

in La. R.S. 13:3471, must nevertheless meet the requirements of Due Process. *Terasse v. Wisconsin Feeder Pig Marketing Coop.*, 202 So.2d 330 (La. App. 1st Cir. 1967). There the plaintiff, interested in purchasing dairy cows, contacted one Shall, a Louisiana resident, who furnished plaintiff a price list for cows which he had received from the foreign corporation defendant. The sale was agreed to and the cows were delivered and paid for in Louisiana. The Court found that it was not an infringement of due process to exercise jurisdiction over the defendant because of the defendant's contact with the State through Shall, its commissioned agent or broker.

These and many other Louisiana authorities on the subject have been recently reviewed in the exhaustive opinion in *Fisher v. Albany Machine & Supply Co.*, 246 So.2d 218 (La. App. 1st Cir. 1971). In all of the cases where jurisdiction was exercised there was considerably more contact with the State than mere communication. *Nigro v. Cessna Aircraft Company*, 169 So.2d 594 (La. App. 4th Cir. 1964); *Covington v. Southern Specialty Sales Company, Inc.*, 158 So.2d 79 (La. App. 1st Cir. 1963); *Home Gas & Fuel Co., Inc. v. Mississippi Tank Co., Inc.*, 143 So.2d 641 (La. App. 3rd Cir. 1962). Indeed, there appeared to be more contact than mere communication in a few of the cases where jurisdiction was declined. *Universal Carloading & Distributing Co., Inc. v. Saia Motor Freight Line, Inc.*, 156 So.2d 608 (La.App. 4th Cir. 1963); *Stelly v. Quick Manufacturing, Inc.*, 228 So.2d 548 (La. App. 3rd 1969).

Of course, Western relies on the case of *McGee v. International Life Insurance Company*, supra, in which the United States Supreme Court upheld jurisdiction when (as Western puts it) "the only contacts were by mail to and from the forum state.: However, we find, as the Supreme Court found in *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), that the cause of action in this case is not one that arises out of an act done or transaction consummated in the forum state, and is, therefore, distinguishable from *McGee*. The Supreme Court in *Hanson v. Denckla*, supra, remarked:

> "The application of that rule [contact with the forum state] will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." (257 U.S. at 253, 78 S.Ct. at 1240).

Our analysis, both quantitative and qualitative, of the Correspondence between Benjamin in Louisiana and McAleer in Virginia does not lead us to conclude that McAleer was "transacting business" in Louisiana as that phrase is interpreted by the Louisiana courts. That McAleer came to Louisiana at the request of Benjamin on one single occasion to inspect the vessel long after she had been constructed does not alter our conclusion. *Fisher v. Albany Machine & Supply Co.*, supra.

Western also places emphasis on the fact that McAleer provided the design of the INDRA IV which was to be home ported in New Orleans, Louisiana. While the fact that Louisiana was to be the vessel's home port was deemed significant in Western's motion to dismiss with regard to R.S. 13:3201(b), it would be stretching the facts too far to say that McAleer contracted to supply services or things (the design) in Louisiana. His design, drawn in Virginia, was used by Western in connection with the construction of the vessel in Washington. Other factors which indicated Western's presence in the State, such as advertisement in media circulated in Louisiana and its warranty of repairs which foreseeably would be made in Louisiana and repairs actually made in Louisiana and charged to Western, do not exist in McAleer's case.

With respect to Benjamin's claim against Western we noted that extensive negotiations were conducted by plaintiff and defendant through communications emanating from and received in Louisiana and that the cause of action arose out of a commercial agreement with foreseeable economic repercussions in Louisiana. See *Cassel v. Loyola University*, 294 F.Supp. 622 (D.C. Tenn. 1968). We also note that absolutely no contact between Western and its third-party defendant, McAleer, occurred in the State of Louisiana. Thus, the intent of the long arm statute, "to provide the Louisiana resident with maximum protection of Louisiana Courts from injury occasioned him through acts or omissions of a non-resident when that non-resident has

'minimal contacts' with the state,"[4] would not be served by holding McAleer amendable to Western's third-party action here in Louisiana.

McAleer's communication with Benjamin concerning his work on the design done in Virginia and McAleer's single visit to Louisiana, viewed in the totality of the circumstances set out above, fall short of the "minimal contacts" required by both the state and federal decisions. The Motion to Dismiss for lack of jurisdiction over the person, brought by third-party defendant, McAleer, should be and the same is hereby GRANTED.

/s/ Edward J. Boyle, Sr.
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
November 22nd, 1971.

[4] *Aucoin v. Hanson*, 207 So.2d 834, 836 (La. App. 3rd Cir. 1968).

Supreme Court, U.S.
FILED
SEP 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-

No. 1683

EDWARD B. BENJAMIN,
Plaintiff-Petitioner,

versus

WESTERN BOAT BUILDING CORPORATION,
Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

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EDWARD B. BENJAMIN,
Plaintiff-Petitioner,

versus

WESTERN BOAT BUILDING CORPORATION,
Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Respondent herein, Western Boat Building Corporation ("Western Boat" hereinafter), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari submitted by Petitioner, Edward B. Benjamin ("Benjamin" hereinafter).

By way of background, this case is a suit on a contract, whose focal issue is jurisdiction over the person of Respondent. Respondent's pleas to be dismissed for lack of jurisdiction were denied by the district

court, but upheld by the Appellate Court (the United States Court of Appeals for the Fifth Circuit).

Respondent submits that the decisions of the Appellate Court, dismissing Benjamin's suit, were perfectly correct both on original consideration and on denial of rehearing and denial of rehearing en banc. Respondent submits that the opinion of the Court of Appeals shows clearly that it weighed carefully all of the facts in this case, that it properly applied the law of jurisdiction *in personam* and that the dismissal of this suit was proper. The Appellate Court's decisions are reported as *Benjamin v. Western Boat Building Corporation,* 472 F.2d 723 (5th Cir., 1973); reh.den. (App. A); rehearing en banc denied, 474 F.2d 1347-48 (5th Cir., 1973) (App. B).[1]

Benjamin's litigation against Western Boat commenced in 1969 with the filing of the same complaint in two separate Federal district courts: the U. S. District Court for the Eastern District of Louisiana, New Orleans Division, and the U. S. District Court for the Western District of Washington, Southern Division. The latter suit is still pending, inasmuch as the United States Court of Appeals for the Ninth Circuit has reversed in part a summary judgment in favor of Western Boat, and has remanded the case to the District Court. *Benjamin v. Western Boat Building Corporation,* 475 F.2d 1085 (9th Cir., 1973).

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[1]References herein to the Appendix refer to the Appendix to the Petition for Writ of Certiorari, filed by Petitioner and are abbreviated as "App.". The opinion of the Fifth Circuit in this case will be referred to merely as *Benjamin,* with the appropriate page reference.

Although, Benjamin states in his Petition for Writ (at page 8) that the issue before this Court is one of law, one would assume from a reading of his Statement of the Case that he is attempting to make it one of fact, also. There is no dispute of fact, and the following facts were considered by the Appellate Court and are well documented by the record. *Benjamin*, 472 F.2d 723, at 727-728; (App. A, at 9a-11a).

In 1957, Benjamin retained a Virginia marine architect, one Roger McAleer, in the City of Washington, D. C. to design a new sailboat. McAleer agreed to produce specifications and drawings, take bids for construction of the vessel, make recommendations to Benjamin on the bids, and make inspection trips at the boat builder's yard.

In August, 1958, after more than a year of design work, McAleer requested a bid from Western Boat in the State of Washington. Western Boat submitted its bid to McAleer in Alexandria, Virginia and sent a copy to Benjamin at his part-time home in Greensboro, North Carolina. In response, Western Boat received a letter from Benjamin in Greensboro, North Carolina advising that he, Benjamin, had signed four copies of the contract, was forwarding them by separate cover, and requesting return of the executed copies to Greensboro, North Carolina.

On September 30, 1958, Western Boat accepted and executed the contract at Tacoma, Washington. Western Boat then mailed copies of the executed contract to Benjamin at Greensboro. Shortly after, Benjamin

sent a letter from Greensboro to Western Boat at Tacoma, acknowledging Western Boat's letter of September 30th and receipt of the executed copies of the contract.

The Contract. The contract called for *construction* of the vessel at Tacoma, Washington in accordance with McAleer's plans and specifications. The contract called for Benjamin to furnish certain materials for installation in the vessel at Tacoma, Washington. *Payments* to Western Boat of the contract price were to be made in Tacoma. The contract called for *inspections* by Benjamin or McAleer to take place at Tacoma. *Delivery* of the vessel was specified in Tacoma, and *acceptance* of the vessel by Benjamin at Tacoma was likewise required by the contract.

After execution of the contract, work began immediately at Western Boat's yard in Tacoma. There then followed a series of communications among Benjamin, Western Boat, and McAleer. Benjamin initiated practically all of the correspondence, and he himself described it as pertaining to "a few little details of furnishing things" or other "odd things to put aboard the boat". Benjamin asked questions about the construction progress, inquired as to the payment schedule (which was set out in the contract), volunteered comments about his plans for the boat, and frequently wrote just to say where he was. He directed substantial amounts of correspondence from Greensboro, North Carolina, from Coconut Grove, Florida, or from a boat on the waters.

From date of the contract, September 30, 1958, through the end of Western Boat's undertaking, August of 1959, construction of the vessel in every aspect took place at Western Boat's yard in Tacoma, Washington. The boat was delivered to Benjamin and accepted by him in the State of Washington. Further, at no time did any representative of Western Boat come to Louisiana.

At the time of his acceptance of the vessel, in August, 1959, Benjamin not only exercised rights of legal ownership but also took actual physical control of the vessel - all in the State of Washington. Benjamin then sailed his vessel on the West Coast and shipped it from San Francisco, California to Tampa, Florida. Final adjustment of the bill and payment by Benjamin to Western Boat followed, several months later. Nearly ten years after acceptance of the vessel, Benjamin commenced this litigation and its counterpart in the State of Washington.

The absence of contacts by Western Boat with the State of Louisiana is further seen from the following facts, all found by the Appellate Court. In fact, Western Boat: (1) is a corporation organized under the laws of the State of Washington; (2) is not qualified to do business in the State of Louisiana; (3) has not incurred nor paid taxes to the State of Louisiana; (4) has not appointed an agent for service of process in Louisiana; (5) has no office, no place of business, no officers, no agents, no employees, no salesmen, no licenses, no franchises, and no distributors in the State of Louisiana; (6) is not listed in the telephone directories in

Louisiana; (7) has no assets in Louisiana (8) does no advertising in any of the Louisiana media; (9) has no independent dealers in Louisiana; (10) has never delivered or arranged to be delivered a vessel, of any kind, in the State of Louisiana; (11) has never made a sale to a resident of Louisiana other than Benjamin, and that took place in Washington; and (12) has never sent representatives, inspectors, repair or service personnel to Louisiana. *Benjamin*, 472 F.2d 723 at 729, (App. 13a).

In sum, the facts of this case led the Appellate Court to conclude, even under the broadest interpretation of the due process minimum contacts requirements (*Benjamin*, 472 F.2d 723, at 729; (App. A, at 12a)) ". . . that there is such an absence of contact by Western Boat with the territorial jurisdiction of Louisiana that the maintenance of a suit against it in Louisiana for a personal judgment offends 'traditional notions of fair play and substantial justice.'" *Benjamin*, 472 F.2d 723, at 727 (App. A, at 8a).

QUESTION PRESENTED

Did the Appellate Court err in dismissing petitioner's Louisiana suit against Western Boat because of lack of jurisdiction *in personam* over Western Boat?

REASONS FOR DENYING THE PETITION

1) The Appellate Court was correct in ruling that Benjamin, as the party invoking the jurisdiction of the

Court, failed to meet the burden of establishing jurisdiction.

2) The Appellate Court correctly held that the assertion of jurisdiction over Western Boat exceeded Federal limits.

A. The Appellate Court decision faithfully follows the decisions of this Honorable Court;

B. The Appellate Court decision does not conflict with decisions of other circuits.

ARGUMENT

I. The Appellate Court Was Correct In Ruling That Benjamin, As The Party Invoking The Jurisdiction Of The Court, Failed To Meet The Burden Of Establishing Jurisdiction.

This Honorable Court has held that the party seeking to invoke the jurisdiction of a Federal Court has the burden of establishing jurisdiction, when it is seriously challenged. "If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The Fifth Circuit has followed that guideline, and appropriately held that the party invoking the jurisdiction of a Court has the burden of establishing that jurisdiction exists, and that the burden is not shifted to the challenging party to disprove jurisdiction. *Tetco Metal Products, Inc. v. Langham,*

387 F.2d 721 (5th Cir., 1968); *Gaitor v. Peninsula and Occidental S. S. Co.*, 287 F.2d 252 (5th Cir., 1961).

The Appellate Court followed those precedents and concluded that Benjamin had failed to meet that burden as to his Louisiana suit against Western Boat. *Benjamin*, 472 F.2d 723, at 731 (App. A. at 18a). This is not at all to say that Benjamin failed for lack of opportunity because that is not the case. It is to say that, after all the facts were made known to and assessed by the Appellate Court, that Court held that Benjamin had not proved jurisdiction.

II. The Appellate Court Correctly Held That The Assertion Of Jurisdiction Over Western Boat Exceeded Federal Limits.

In his petition for writ, Benjamin essentially argues that, since the boat in question was built for a Louisiana resident and was to be home-ported in Louisiana, jurisdiction is conferred by virtue of *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957) or, failing that, by virtue of the "stream of commerce" theory.

Benjamin makes references in his Petition to "extensive preliminary negotiations" between him in Louisiana and Western Boat in Washington. These references must have been inadvertently made, because none of these negotiations occurred in Louisiana. All contract negotiations took place by and between Western Boat in Washington and McAleer in Virginia. Moreover, all discussions, correspondence, and communications among all parties at any time always concerned a

vessel contracted for, built, inspected, delivered and accepted in the State of Washington.

Similarly, unfortunate and unfounded references are made in Benjamin's Petition for Writ that Western Boat shipped the vessel to Benjamin in Louisiana. As the Appellate Court properly observed, Benjamin went to Tacoma and *there* accepted delivery and took physical possession of the boat. Benjamin sailed it on the West Coast and he, Benjamin, shipped it from San Francisco to Tampa, Florida and *not* to New Orleans, Louisiana. *Benjamin*, 472 F.2d 723, at 728 (App. A, at 11a).

The implication that Benjamin, as a Louisiana resident, was going to use his boat solely in Louisiana, as reflected by its being home-ported in New Orleans, is misleading. It is clear that Benjamin resided sometime in New Orleans, sometime in North Carolina, and spent a good portion of his time in leisure and business activities in various other areas of the United States and abroad. The vessel was to be used extensively and, as a matter of fact, was used extensively in non-Louisiana waters. As this Honorable Court is well aware, the designation of a home port is primarily an incident of U. S. Coast Guard licensure. As the Appellate Court properly held, the factor of home porting in this case was of no jurisdictional moment since the contract called for delivery "free of liens of any kind", since there were in fact no liens, and since this isolated sale took place in the State of Washington. *Benjamin*, 472 F.2d 723, at 730 (App. A, at 15a-16a).

A. *The Appellate Court decision faithfully follows the decisions of this Honorable Court.*

Benjamin would seek to have *McGee, supra,* throw a cloak of jurisdiction over a set of unfavorable facts. Benjamin would have no reference made and, in fact, makes no reference to *Hanson v. Denckla,* 357 U.S. 235 (1958) and he makes only passing reference to *International Shoe Company v. State of Washington,* 326 U.S. 310 (1945).

The Appellate Court properly considered all three landmark cases. It found that *McGee* did not stand for the proposition that Benjamin sought to enunciate. *McGee* just did not hold, whenever there is a contract between citizens of two States, that both States have jurisdiction. Nor did *McGee* stand for the proposition that such a contract, coupled with correspondence between the parties, confers jurisdiction. *McGee* did stand for the proposition that due process requirements for jurisdiction were satisfied in the case of a non-resident insurer, which initiated the contact that ripened into a contract of life insurance, which delivered the policy to the decedent in the forum State, in that instance where the crucial witnesses (to the policy defense of suicide) all lived in the forum State.

In contrast, as the Appellate Court noted, the instant case obviously does not involve insurance nor a State statute providing its residents with effective redress against foreign insurers. Further, as the Appellate Court noted, Western Boat did not initiate the transaction; nor did Western Boat make delivery in Louisi-

ana. Further, by no means do all crucial witnesses reside in Louisiana. Benjamin is challenging the caliber of the vessel construction, all of which construction was done by Washington residents at Tacoma.

Directed by *Internation Shoe*, the Appellate Court in this case also asked: did Western Boat have sufficient minimum contacts with the forum State of Louisiana to permit the suit to be maintained in Louisiana without offending due process? The legal standard is correct. The answer was correct: "Maintenance of this action against Western Boat in Louisiana would *unquestionably* 'offend traditional notions of fair play and substantial justice.'" (Emphasis supplied; reference omitted.) *Benjamin*, 472 F.2d 723, at 731 (App. A, at 18a).

Directed by *Hanson*, the Appellate Court also asked whether Western Boat purposefully availed itself of the privilege of conducting activities in Louisiana so as to invoke the benefits and protections of its laws. The Court held that not even under "the broadest interpretation" could it find that Western Boat had so conducted itself. *Benjamin*, 472 F.2d 723, at 729 (App. A, at 12a).

In short, the Appellate Court considered this case in light of all due process jurisdictional approaches.[2]

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[2]The Appellate Court also considered a number of other jurisdictional cases in reaching its decision. *Benjamin*, 472 F.2d 723, at 726-727 (App. A, at 4a-8a). These cases involved claims on *contracts* made outside the forum State. The decisions required certain minimum contacts with the forum other than a *res* within the forum in order to satisfy "traditional notions

It found jurisdiction over Western Boat under none. Petitioner's contention that the Appellate Court insisted on a higher standard ("physical in-state business activity") than is required by this Honorable Court is obviously unfounded.

B. *The Appellate Court decision does not conflict with decisions of other circuits.*

In an effort to interest this Honorable Court with another theory of jurisdiction, Benjamin suggests a conflict in the circuits over the "stream of commerce" theory. The suggestion is ill-founded and, in fact, unfounded. There simply is no such conflict in the circuts. Further, even if there were a conflict, the theory would be inapplicable in this case.

The Fifth Circuit on at least two other occasions has specifically used the "stream of commerce" theory: *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir., 1969) and *Coulter v. Sears Roebuck & Co.*, 426 F.2d 1315 (5th Cir., 1970). Moreover, the Fifth Circuit carefully considered that theory in this case. *Benjamin*, 472 F.2d 723, at 726, 730 (App. A at 4a, 6a, and at 16a). However, it found Benjamin entitled to no relief under that theory because this case not only involved one isolated sale, *but it involved a sale which took place in the State of Washington. Benjamin*, 472 F.2d 723, at 730 (App. A, at 15a-16a).

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of fair play and substantial justice". See *Owen of Georgia, Inc. v. Blitman*, 462 F.2d 603 (5th Cir., 1972), *Hamilton Bros., Inc. v. Peterson*, 445 F.2d 1334, (5th Cir., 1971); and *Florida Towing Corp. v. Oliver J. Olson & Co.*, 426 F.2d 896 (5th Cir., 1970).

The Appellate Court felt no need in this case to go further and distinguish the "stream of commerce" products liability cases sounding in tort, involving personal injuries or delictual damage occurring in the forum State, where all the pertinent witnesses to the accident or injuries reside. The cases cited in the Petition for Writ in support of the "stream of commerce" theory — unlike the instant case — are all tort, products liability, personal injury cases.

The only decision of another circuit cited by Benjamin is *Florio v. Powder Power Tool Corp.*, 248 F.2d 367 (3rd Cir., 1957). The case involved a claim for personal injuries suffered by a minor when a power tool, manufactured by the non-resident defendant, misfired and caused a steel stud to be imbedded in the minor's brain. The Court found the non-resident manufacturer amenable to jurisdiction because of a systematic scheme of sales promotion in the forum State, because it had a tightly-regulated exclusive distributor who regularly sold its products in the forum state, because it had a direct employee who regularly did promotional work and repair work in the forum State, and because the distributors' contracts were considered as executed in the forum state. The Court specifically mentioned the presence of the crucial witnesses in the forum state. One can easily see, if *Florio* is truly a "stream of commerce" case, which is certainly subject to question, that, in any event, it involves a whole set

of circumstances and activities not present in this case.[3]

The case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) is certainly an interesting case and is considered by

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[3]Further, neither *Florio, supra,* nor the other cases cited by Benjamin support his suggestion that "stream of commerce" is a separate jurisdictional standard, wholly prescinding from the due process jurisdictional critera, enunciated by this Honorable Court.

None of the Federal District Court opinions cited by Benjamin are pertinent to this case. The case of *Etzler v. Dille and McGuire Manufacturing Company*, 249 F.Supp. 1 (W.D. Va., 1965) is inapposite (personal injury products liability case arising from plaintiff's suffering an amputated leg when the non-resident manufacturer's rotary lawn mower malfunctioned; but the Court found substantial revenue derived from the sale of mowers in the forum State and a persistent course of direct shipment of the mowers to purchasers in the forum State); The case of *Keckler v. Brookwood Country Club*, 248 F.Supp. 645 (N.D. Ill., 1965) also is not pertinent inasmuch as it, too, involved personal injuries resulting from a motorized golf cart, but the court found no jurisdiction as to an alleged strict liability claim because of the absence of even allegations of broadspread distribution of products in volume. In *Hartford v. Smith*, 257 F.Supp. 578 (N.D., W.Va., 1966), the Court considered another personal injury suit arising from the explosion of a bottled-gas cooking stove, manufactured by a non-resident company which admittedly advertised, and directly solicited sales on a regular basis in the forum State.

In *Jackson v. National Linen Service Corp.*, 248 F.Supp. 962 (W.D., Va., 1965), the Court held a non-resident solvent manufacturer amendable to jurisdiction in a suit for personal injuries sustained when the solvent exploded. The non-resident filled orders directly to customers of the forum State, sent direct advertising materials to them, and had substantial, persistent direct and indirect sales to residents of the forum State. The case of *Anderson v. Pennscraft Tool Co.*, 200 F.Supp. 145 (N.D., Ill., 1961) involved another personal injury action against a non-resident company, which apparently regularly sold its tools to customers in Illinois (the forum State) from the adjoining State of Michigan.

some to be the landmark case on "stream of commerce." However, it is of little assistance to the Court in this case. *Gray*, also, is a personal injury case arising from an explosion of a water heater, whose safety valve was allegedly improperly constructed. The non-resident manufacturer of the safety valve was held to have committed a "tortious act", within the contemplation of the Illinois "long-arm" statute, in the forum State because of the occurrence of the injury or final element of the tort in the forum State. Unlike what Benjamin states in his Petition for Writ, the Illinois Supreme Court did not find only an isolated or single instance of product-use in the forum state. To the contrary, the Court concluded that there was "a substantial use and consumption in this State" of th on-resident manufacturers' valves and that its business was directly affected by transactions in the forum State, and that it enjoyed benefits from the laws of the forum State. *Gray, supra*, 22 Ill.2d at 441-443, 176 N.E.2d at 766.[4]

In summary, there is no conflict in the circuits regarding the "stream of commerce" theory; and the theory is not applicable in this instance in any event. Western Boat did not put the boat into the stream of

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[4]The discussion of *Gray*, and its emphasis on construction of a State statute brings to mind the issue of Louisiana law, which the Appellate Court herein did not reach. Respondent remains firmly of the opinion that the scope of the Louisiana "long-arm" statute (La.R.S. 13:3201) is not broad enough to confer jurisdiction over Western Boat on the facts of this case. Nonetheless, even if Respondent were incorrect in that regard, it would follow that the assertion of such jurisdiction would run contrary to the due process requirements of the United States Constitution.

interstate commerce. It sold the boat in Washington to Benjamin, who had it built there, who inspected it there, and who accepted delivery there.

CONCLUSION

The well-reasoned opinion of the Appellate Court in this instance reached the only fair and proper conclusion. Its decision should be maintained by this Honorable Court, and the Petition for Writs of Certiorari should be denied.

All of which is respectfully submitted,

ADAMS AND REESE

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been served upon each of the following

named at the stated addresses, by depositing the same, full postage prepaid, in the United States mail: Petitioner, Edward B. Benjamin, through his counsel of record, William A. Porteous, III, Esquire, 704 Carondelet Street, New Orleans, Louisiana 70130; and to Hendrik Uiterwyk, Esquire, 2141 International Trade Mart Building, New Orleans, Louisiana, 70130; and to Gerard H. Schreiber, Esquire, 8137 Oleander Street, New Orleans, Louisiana, 70118; and to Alan Y. Cole, Esquire, 1730 "K" Street, N. W., Washington, D. C., 20006.

New Orleans, Louisiana, this ____ day of September, 1973.

HENRY B. ALSOBROOK, JR.